In the Supreme Court of the United States

OCTOBER TERM, 1949

In the Matter of the Estate of EMILY P. SANBORN, DECEASED

THE UNITED STATES OF AMERICA, APPELLANT,

v.

CHARLES F. GAYETTY, ANNIE L. HARRIS, GEORGE E. BREECE, BEN ROY, GERTRUDE BARRON, MARGELIA GILE BERNARD, ELTEEN KNOWLES, RALPH THIBAULT, GLENN THIBAULT, ANGELIA NICHOLS, EDNA L. KING, FERNE L. THIBIDEAU, LEONA M. DICKINSON, EDITH M. DICKINSON, GENEVA GILE FULLER, HERMAN GILE, HAROLD GILE, FLOYD GILE, SHERMAN GILE, EARLAND GILE, RENA GILE, GEORGE GILE, CHESTER GILE AND LA FOREST GILE, APPELLEES

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this case. The date of the judgment entered by the Supreme Court of California is March 22, 1949. The petition for appeal is

presented to the Supreme Court of the United States herewith, to wit, on June 15, 1949.

JURISDICTION

The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the decision in this case is conferred by Section 1257(2) of Title 28, U.S.C., as codified by the act approved June 25, 1948, effective September 1, 1948. The following cases are believed to sustain the jurisdiction of the Supreme Court: *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California,* 318 U.S. 285; *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,* 318 U.S. 261; *Standard Oil Co. of California* v. *Johnson, Treasurer of the State of California,* 316 U.S. 481; *United States* v. *Klein,* 303 U.S. 276.

STATE STATUTE INVOLVED

The statute of the State of California which was held to be valid but which the appellant contended was unconstitutional is the Probate Code of California, particularly Section 27, which provides as follows:

> *Who may take by will.* A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute.

THE ISSUES AND THE RULING BELOW

Upon her death on February 4, 1945, Emily P. Sanborn, a resident in the County of Los Angeles left a will dated June 12, 1942 (Tr.[1] 2, 4, 31-32). Item III of the will provided: "I hereby give, devise and bequeath unto the UNITED STATES OF AMERICA, all of my bonds issued by the United States Government, which stand in my name and which I may hereafter acquire in my name, and all of the real properties and interests in such properties which I now own and of which I shall or may die seized or possessed" (Tr. 32).

Annie L. Harris, an heir at law, petitioned the Superior Court of the State of California in and for the County of Los Angeles to admit this will for probate, which she alleged was the last will of the deceased (Tr. 53). In her petition, she stated that Willis Sargent named in the will as executor had declined to act as such executor and prayed that Letters of Administration with-the-will-annexed be issued to her (Tr. 53, 57). She further declared "her hostility to Item III of said Will" and that "at the appropriate time and by appropriate proceedings she will object to distribution of said estate under the terms of said Item III on the ground that a testamentary disposition may not be made to the UNITED STATES OF AMERICA under the provisions of Section 27 of the Probate Code of the State of California" (Tr. 57). After a contest, this will was admitted for probate and Letters of Administration with-the-will-annexed were issued to Annie L. Harris (Tr. 34-36, 39).

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[1] References, unless otherwise noted, will be to the pages in the typewritten Clerk's Transcript on Appeal, upon which the case was reviewed by the Supreme Court of California and which is included in the transcript certified to this Court.

The administratrix thereafter filed a petition for final distribution, alleging that although the United States claimed to be entitled to have distributed to it all of decedent's United States Government Bonds and all of her real property, the United States was not eligible to take these gifts under Section 27 of the Probate Code and the heirs at law were entitled to distribution of the whole estate (Tr. 1, 8-9). The Superior Court, noting that the United States objected to the heirs' petition, entered a decree of final distribution, in which it ordered the distribution to the United States, in accordance with the provisions of Item III of the will, of the deceased's United States Savings Bonds and cash representing monies received as net income from real property and conversion values of real property sold in the proceedings in the amount of $12,689.78 (Tr. 25, 27).

The heirs appealed to the Supreme Court of California (Tr. 44). In an opinion rendered the same day as that in the *Estate of Burnison*, 33 Cal. Adv. 613, the Supreme Court of California, one judge dissenting, reversed, on the authority of the *Burnison* case, 33 Cal. Adv. 621. The Court stated (p. 622):

> The only question here presented is whether the challenged testamentary disposition to the "United States of America" is valid under the laws of this state. The parties advance the same opposing contentions in relation to the construction of section 27 of the Probate Code, prescribing "who may take by will," as were considered and resolved in a like situation prevailing in the *Estate of Burnison*, this day decided, *ante*, p. [P. 2d]. * * *

In addition to its contentions in the *Burnison* case, which it likewise urged here, the United

States relied on two statutes (Act of April 3, 1945, 59 Stat. 48 c. 51, § 4; 31 U.S.C.A. § 757e; Act of March 3, 1903 (32 Stat. 1112, c. 1007, § 1; 40 U.S. C.A. § 304), which, it claimed, established its authority to take the bonds and real estate left it by the decedent. It contended that if state law alone does not authorize the bequest and devise to the United States, "it must be read together with the Federal law in order to give effect to the Federal right and to avoid the unconstitutional discrimination that otherwise would result." The Court rejected that contention with the comment (pp. 622-623):

> * * * such congressional enactments, by their provision for the government's disposition of such testamentary gifts, can be regarded as no more than implied recognition of the power of the United States to take property by will, but only where such act would be in accordance with the law of the state governing the right to make the testamentary disposition in question. Certainly such federal statutes cannot validate a "devise" or "bequest" of property in this state made by a California resident contrary to our statutory law. (*Estate of Burnison, supra.*) * * *

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case is a companion to *Estate of Burnison* and presents the same questions as those presented in the *Burnison* case, *i.e.*, whether a state may deny to the United States the right to receive a gift willed to it by a decedent domiciled in that state, and whether Section 27 of the Probate Code of California, as construed by the Supreme Court of California, has a discriminatory effect against

the United States in violation of Article VI of the Constitution.

In addition to the discussion as to the substantiality of these questions set out in the Statement as to Jurisdiction in the *Burnison* case, which is hereby incorporated by reference and to which the Court is respectfully referred, it should be noted that Congress, by the Act of April 3, 1945, 59 Stat. 48, 31 U.S.C. 757e [2] and the Act of March 3, 1903, 32 Stat. 1112, 40 U.S.C. 304 [3] expressly recognized the authority of the United States to take by will the kind of property here involved, *i.e.*, United States saving bonds and real property. The California Supreme Court's construction of these statutes, that they "can be regarded as no more than implied recognition of the power of the United States to take property but only where such act would be in accordance with the law of the state governing the right to make the testamentary disposition in question," is, as are its holdings in the *Burnison* case, premised on that court's holding that the states' power to determine the descent of property within its jurisdiction is not subject to constitutional limitations. Once, the sovereign power of the United States, created by the Constitution, to receive testamentary gifts

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[2] "Whenever any direct obligation of the United States, bearing interest or sold on a discount basis, is donated to the United States, is bequeathed by will to the United States, become [So in original.] the property of the United States under the terms of a trust, or is by its terms payable upon the death of the owner to the United States or any officer thereof in his official capacity, the Treasurer of the United States upon receipt of such obligation shall effect redemption thereof. * * *"

[3] "The Secretary of the Treasury is authorized to sell such lands as have been or may be acquired by the United States by devise, upon such terms and after such public notice by advertisement as he may deem best for the public interest."

is recognized, it becomes clear that these statutes, properly read, authorize the United States to receive by will bonds and real estate such as here involved, thereby bringing into sharp focus the failure of the California Supreme Court to give effect to the sovereign right of the United States to receive testamentary gifts and that Court's discrimination against the United States, in violation of Article VI of the Constitution

There are appended hereto a copy of the opinion of the Supreme Court of California in the instant case together with a copy of the opinion of the Supreme Court of California and the District Court of Appeal, State of California, First Appellate District in the *Burnison* case.

THE UNITED STATES OF AMERICA.
By: PHILIP B. PERLMAN,
Solicitor General.

OPINION OF THE SUPREME COURT

SPENCE, J.—Testatrix, a resident of Los Angeles, devised and bequeathed to the "United States of America" all her real property in this state and her government bonds. The will contains no residuary clause so that in the event of the failure of such devise and bequest, such property would descend to the decedent's heirs at law under the laws of succession. In the probate proceedings, the court ordered distribution of the mentioned property in pursuance of the terms of the will. From the portions of the decree of final distribution accordingly entered in favor of the "United States of America," the heirs bring this appeal.

[1] The only question here presented is whether the challenged testamentary disposition to the "United States of America" is valid under the laws of this state. The parties advance the same opposing contentions in relation to the construction of section 27 of the Probate Code, prescribing "who may take by will," as were considered and resolved in a like situation prevailing in the *Estate of Burnison*, this day decided,[1] *ante*, p. — [P. 2d]. The only additional point here made relates to the pertinency of the government's reference to two specific federal statutes as establishing the "authority of the United States to take by will." One is the Act of April 3, 1945 (59 Stats. 48, c. 51, § 4; 31 U.S.C.A. § 757e), declaring that "the Treasurer of the United States . . . shall effect redemption" of "any direct obligation of the United States" (such as government bonds) that "is bequeathed by will to the United States"; and the other is the Act of March 3, 1903 (32 Stats. 1112, c. 1007, § 1; 40 U.S.C.A. § 304), authorizing "the Secretary of the Treasury . . . to sell such lands as have been or may hereafter be acquired by the United States by devise." However, such congressional enactments, by their provision for the government's disposition of such

[1] Advance Report Citation: *Ante*, p. 613.

testamentary gifts, can be regarded as no more than implied recognition of the power of the United States to take property by will, but only where such act would be in accordance with the law of the state governing the right to make the testamentary disposition in question. Certainly such federal statutes cannot validate a "devise" or "bequest" of property in this state made by a California resident contrary to our statutory law. (*Estate of Burnison, supra.*) Accordingly, the objections of the heirs to the claims of the "United States of America" under the terms of the decedent's will must be sustained.

The portions of the decree here subject to appeal are reversed.

Gibson, C. J., Shenk, J. Carter, J., and Schauer, J., concurred.

Edmonds, J., concurred in the judgment.

Traynor, J., dissented.

OPINION OF THE SUPREME COURT IN THE BURNISON CASE

SPENCE, J.—This is an appeal from an order denying distribution of the decedent's estate to his heirs—three brothers, a sister, and 13 nieces and nephews—and sustaining the objections of the United States of America, the sole beneficiary under the terms of the will. The entire estate—consisting of personal property appraised at $22,668.70—was left to "The United States Government U.S.A." Appellant maintains that the "United States of America is not authorized by statute or otherwise to take under a will executed in the State of California by a resident" thereof, that the testamentary "bequest" is therefore "void", and that all of the estate should be distributed to the "heirs at law of deceased under and pursuant to the laws of succession of" this state. His position is well taken under the prevailing statutory law applicable in determination of the issue involved.

[1] At the outset it should be said that the authorities without exception hold that "the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes." (*In re Walker*, 110 Cal. 387, 390 [42 P. 815, 52 Am. St. Rep. 104, 30 L.R.A. 460]; see, also, *Estate of Carpenter*, 172 Cal. 268, 269 [156 P. 464, L.R.A. 1916E 498]; *Estate of Wilkinson*, 113 Cal. App. 645, 646 [298 P. 1037].) The Legislature may withhold the right altogether, or impose any conditions or limitations upon it which it chooses. (*Estate of Durlewanger*, 41 Cal. App. 2d 750, 752 [107 P. 2d 477]; *Estate of Bauer*, 51 Cal. App. 2d 636, 637 [124 P. 2d 630].) [2] As a necessary postulate of this proposition, it follows that the Legislature has the exclusive power to designate those whom the testator may make the objects of his bounty. (*In re Wilmerding*, 117 Cal. 281, 284 [49 P. 181].)

[3] Equally well settled is the general rule that the distribution of a decedent's personal estate is governed by the law of his domicile. (*Estate of Sloan*, 7 Cal. App. 2d 319, 333-334 [46 P. 2d 1007].) It was early recognized in decisions of this state—as *Estate of Apple*, 66 Cal. 432, 436-437 [6 P. 7]; *Whitney* v. *Dodge*, 105 Cal. 192, 197-198 [38 P. 636]; *Estate of Lathrop*, 165 Cal. 243, 247 [131 P. 752]—and it is likewise declared by section 946 of the Civil Code.

In the light of these established principles, the language of section 27 of the Probate Code, prescribing "who may take by will," must be construed as determinative of the validity of the bequest here in question. That section reads as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporate religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for

religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

[4] The government cites the opening language of the statute, in its designation of "the state" as a proper recipient of a "testamentary disposition," as embracing the United States. But in construing a statute, words are to be taken in their ordinary sense and normal signification (23 Cal. Jur. § 109, p. 730; *Taylor* v. *Lundblade*, 43 Cal. App. 2d 638, 641 [111 P. 2d 344]; *Gayer* v. *Whelen*, 59 Cal. App. 2d 255, 262 [138 P. 2d 763]), and the government's suggested extension of the meaning of "the state" runs counter to this settled rule. Although it must be recognized that historians and other writers frequently use the literary or rhetorical expression and refer to the nation as "the state," the draftsmen of legislation as a rule employ language notable for its precise and definitive character rather than for its elegance. So it would appear that if the Legislature had intended to include the United States within the purview of the statute, " 'the ordinary dignities of speech would have led' to its mention by name." (*United States* v. *Cooper Corporation*, 312 U. S. 600, 606 [61 S. Ct. 742, 85 L. Ed. 1071], citing *Davis* v. *Pringle*, 268 U. S. 315, 318 [45 S. Ct. 549, 69 L. Ed. 974].) Also the collocation of the successively authorized recipients of a "testamentary disposition" should be taken into consideration in construing the meaning of the terms of the statute. (23 Cal. Jur. § 110, p. 732; *People* v. *One 1940 Chrysler Coupe*, 48 Cal. App. 2d 546, 549 [120 P. 2d 117].) Here the collection of "the state" is with "counties" and "municipal corporations," an obvious incongruity if the government's contention were accepted.

Moreover, the statute uses the *definite* article in its mention of "the state," ostensibly to signify

California and to distinguish its purport from the *indefinite* reference of "a state," which latter term might reasonably be construed to mean any established government on earth. So pertinent is the legislative history of section 27 of the Probate Code. As first enacted in 1872 as section 1275 of the Civil Code, it was provided that "no corporation" could take from a California testator "unless expressly authorized by statute" so to do. In 1873 the section was amended so that corporations "formed for scientific, literary, or solely educational purposes" might take under such a will. (Amendments to the codes, 1873-74, p. 275.) In 1881 a separate statute was enacted authorizing the "several counties, cities and counties, cities and towns of this state to accept . . . any gift, bequest and devise . . ." (Stats. 1881, p. 2.) In 1903, section 1275 was amended to permit corporations formed for "hospital purposes" also to take under a will. (Stats. 1903, p. 258.) In 1905, the section was further amended to permit "counties" and "municipal corporations" to take under a California will, subject to the provisions of section 1313, the antecedent of section 41 of the Probate Code concerning "restrictions" upon charitable bequests and devises (Stats. 1905, p. 605), and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 1275.) Manifestly, therefore, when "counties" and "municipal corporations" were so engrafted into section 1275, they carried the same geographical meaning of territorial components of this state as the "act of 1881" had expressly given them, and which they had signified for 24 years. Then in 1931, when, upon adoption of the Probate Code, the Legislature added to the list of entities privileged to take under a California will "the state" in connection with "counties" and

"municipal corporations," it could not have meant any state other than California.

The case of *United States* v. *Fox*, 94 U. S. 315 [24 L. Ed. 192], is closely in point. There the testator, a resident of the state of New York, "devised and bequeathed" all his property "to the government of the United States." The statute of New York provided that a devise of lands might be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question presented for consideration was "the validity of a devise to the United States of real estate situated in the State of New York" The Supreme Court of the United States declared (as the state court had, 52 N. Y. 530, 534 [11 Am. Rep. 751]) that "this question" was "to be determined by the laws of [New York]," (94 U. S. 320.) Then the court, speaking through Mr. Justice Field, stated at page 321 as follows: "The term 'person' as here used supplies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended . . . A devise to the United States of real property situated in that State [New York], is, therefore, void."

It is true that the New York law imposed limitations affecting only devises of "real estate" while the present case concerns the validity of a bequest of personalty under a statute regulating alike the power of a testamentary disposition as to real and personal property. But such difference in statutory scope does not militate against the applicable force here of the reasoning in the Fox case, based as it is on the right of a state to prescribe who can, and who cannot, take by the will of one of its residents. So significant is the case of *United States* v. *Perkins*, 163 U. S. 625 [16 S. Ct. 1073, 41 L. Ed. 287], wherein the "single question" pre-

sented was "whether *personal* property bequeathed by will to the United States [was] subject to an inheritance tax under the laws of New York." (Emphasis added.) Recognizing the right to make a testamentary disposition as "purely a creature of statute and within legislative control" (p. 627), and that when a state "grants" such right, it may annex "any conditions which it supposes to be required by its interests or policy" (pp. 629-630), the court, following citation of the *Fox* case, *supra,* sustained the propriety of the tax—in "diminution" of the amount of the United States would receive under the will—as it was "only upon [such] condition that the legislature assent [ed] to [the] bequest" (p. 630). And as recently as 1942 the Supreme Court of the United States in *Irving Trust Co.* v. *Day,* 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093], wherein was contained the validity of a section of the "New York Decedent Estate Law" concerning the right of a surviving spouse to elect to take against the provisions of a will, cited both the Fox and Perkins cases, *supra,* among others, in support of its broad statement at page 562, as follows: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and *the dead hand rules succession only by sufferance.* Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (Emphasis added.) (See also, *Allen* v. *Markham,* 156 F. 2d 653, 659; *Clark* v. *Allen,* 331 U. S. 503, 517 [67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R. 953].)

The government's contention that if section 27 of the Probate Code should be construed as invalidating the bequest in question, "serious constitutional questions would arise" involving an "unlawful discrimination against the United States" is effectively answered by the Irving Trust Co. case as above quoted. Likewise, the attack upon the pertinency of the basic reasoning in the Fox case, *supra,* and the claim that assuming "the

Fox case cannot be distinguished, it must be regarded as overruled" are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

Nor does the reference in the last sentence of section 27 of the Probate Code to the testamentary capacity of a "corporation . . . expressly authorized by statute" aid the government in its attempt to uphold the validity of the bequest in question. Whether or not the word "corporation" in such "legislative environment" would include the United States as a "governmental body" (see *State of Ohio* v. *Helvering*, 292 U. S. 360, 370 [54 S. Ct. 725, 78 L. Ed. 1307]; *State of Georgia* v. *Evans*, 316 U. S. 159, 161 [62 S. Ct. 972, 86 L. Ed. 1346]), the further requirement of the section is concededly unsatisfied in the government's admission that though "various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses . . . no Federal statute of general application has purported to authorize the United States to so acquire property." [5] It is true that the capacity of the United States to "receive a voluntary devise or bequest" has been regarded as an "inherent attribute of sovereignty" and so sustained as an implied power of the federal government, but such principle has no force where there is an "express statute" of the state wherein "the testator has his domicil" effecting a restriction as to who may be devisees or legatees." (*Dickson* v. *United States*, 125 Mass. 311, 315 [28 Am. Rep. 230].) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take "under a will." (*United States* v. *Fox, supra*, 94 U. S. 315; *United States* v. *Perkins, supra*, 163 U. S. 625; *Irving Trust Co.* v. *Day, supra*, 314 U. S. 556.)

[6] Nor does it strengthen the government's position to refer to section 13841 of the Revenue and Taxation Code, which exempts "property transferred to . . . the United States" from the California inheritance tax. There is no necessary connection between a statute regulating succession to property and one setting forth tax exemptions, and in making laws relating to these two subjects, over which it had plenary authority, the Legislature was not bound to shape its respective enactments to fit any particular pattern or limit its right to impose such conditions as it deemed appropriate in the distinct fields. (*In re Wilmerding, supra,* 117 Cal. 281, 286-287.) There may be, for example, a transfer of property—the residue of a veteran's pension fund—to the United States under the federal escheat laws (*Estate of Lindquist,* 25 Cal. 2d 697, 705 [154 P. 2d 879], cert. den. 325 U. S. 869 [65 S. Ct. 1408, 1410, 89 L. Ed. 1988]; *Estate of Walker,* 25 Cal. 2d 719, 720 [154 P. 2d 891], cert. den. 325 U. S. 869 [65 S. Ct. 1408, 1410, 89 L. Ed. 1988, 1989]) or in pursuance of a contract whereby a veteran, prerequisite to entry into a national soldiers' home, agreed that all his personal property should pass to the board of managers of such home under certain circumstances (*United States* v. *Stevens,* 302 U. S. 623 [58 S. Ct. 388, 82 L. Ed. 484]: *Mauck* v. *United States,* 94 F. 2d 745). But such situations do not furnish any parallel considerations negativing the force of section 27 of the Probate Code as determinative of rights of testamentary disposition of property "within [the] dominion" of this state. (*United States* v. *Perkins, supra,* 163 U. S. 625, 629.)

The government finally relies on the *Estate of Hendrix,* 77 Cal. App. 2d 647 [176 P. 2d 398], to sustain the bequest in question, but an analysis of that case shows it to involve quite dissimilar considerations. There the bequest was made to the "United States Veterans Administration . . . for the purpose of rendering to disabled veterans of the world war . . . such aid, comfort, [and] as-

sistance . . . as may to them be most helpful and profitable, determinable by said . . . [organization]." (P. 649.) As the successor of "a corporation, 'The National Home for Disabled Volunteer Soldiers' " (p. 652), the "Veterans' Administration" is authorized, through its "Board of Managers," to "receive donations of money or property . . . [which would] embrace gifts by means of wills, as well as by transfers during the lifetime of the donors." (P. 653.) Upon classifying the Veterans Administration as a "governmental agency," though unincorporated, and in discussing its testamentary capacity to accept the bequest in question under the laws of California (Prob. Code, § 27), the court declared that "the bequest to the agency was, in effect, a bequest to the parent, United States of America" (p. 651), that "the United States Government is a corporation" (p. 652), that "the [agency] is authorized by statute to take property by will" (p. 652), and that therefore the United States Government, functioning through one of its component parts in a designated field of operation, is a "corporation . . . expressly authorized by statute" to "take [property] under a will" within the purport of section 27 of the Probate Code. (P. 653.) But the validity of the bequest there involved need not rest on that ground, for, as the court indicated in its reference to the analogous considerations prevailing in the *Estate of Yule*, 57 Cal. App. 2d 652 [135 P. 2d 386], the terms of the will, as reasonably construed, provided for "a gift for charitable purposes to a legally constituted institution" (p. 654), and whether or not such recipient was "incorporated" or "unincorporated" was not a material factor affecting its capacity to take the "donation" as so restricted. Accordingly, the bequest to the United States Veterans Administration was properly deemed valid in the light of the liberal provisions of the statute evidencing the legislative purpose to favor "gifts for charitable purposes" in pursuance of "the intent of the donor" (*Estate of Yule, supra*, p. 654), and the further discussion in

the Hendrix case relative to the propriety of holding the "United States of America" to be a "corporation authorized to take by will pursuant to Section 27 of the Probate Code" (p. 650) was unnecessary to the decision, and certainly will not be regarded as furnishing ground for sustaining a bequest to the "United States Government," without qualification as to administration or purpose. From these underlying considerations—both factual and legal—distinguishing the essential focal point of decision, it is manifest that the government's reliance upon the Hendrix case in nowise strengthens its position here. In view of the nature of the power of testamentary disposition, the right of the state to determine the limits under which this power shall be exercised, and the express terms of section 27 of the Probate Code prescribing "who may take by will," the bequest here challenged cannot be sustained as meeting the test of the cited statute, and hence is void.

The order subject of this appeal is reversed.

Gibson, C.J., Shenk, J., Carter, J., and Schauer, J., concurred.

Edmonds, J., concurred in the judgment.

TRAYNOR, J.—I dissent for the reasons set forth in *Estate of Hendrix,* 77 Cal. App. 2d 647, 651-653 [176 P. 2d 398].

OPINION OF THE DISTRICT COURT OF APPEAL IN THE BURNISON CASE

GOODELL, J.—The decedent, a resident of San Francisco, left a will reading as follows:

"June 30, 1932,
205—3rd St.,
San Francisco, California.

This is my last Will & Wish
That I give all I own & possess to the United States government U.S.A.
The beneficiary shall be executor
My body shall be cremated after death

Signed Gust Burnison,
Approved July 27, 1944."

The testator left personal property appraised at $22,668.70. His heirs at law are three brothers, a sister, and thirteen nieces and nephews, all of whom petitioned for distribution of the whole estate to themselves on the ground that "the United States of America is not authorized by statute or otherwise to take under a will" executed in California by a resident of this state. The United States filed written objections thereto which the court sustained. From the order denying the petition for distribution the heirs appeal.

"At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes." (*Estate of Walker,* 110 Cal. 387, 390 [42 P. 815, 52 Am. St. Rep. 104, 30 L.R.A. 460].)

"Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdic-

tion." (*Irving Trust Co.* v. *Day*, 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093].)

[1] By section 27 of the Probate Code our Legislature has prescribed "Who may take by will" as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

The government argues that the phrase "A testamentary disposition may be made to the state" may be interpreted as including the United States. While it is true that historians and other writers frequently adopt the literary or rhetorical expression and speak of the nation as "the state," the draftsmen of legislation as a rule choose language for its definiteness rather than its elegance. Surely if the Legislature had intended to include the federal government it would have named it. As aptly said in *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 [61 S. Ct. 742, 85 L. Ed. 1071], "'the ordinary dignities of speech would have led' to its mention by name." Moreover, the collection of "the state" is with "counties" and "municipal corporations," an obvious incongruity if the government's argument were adopted.

That "the state" means only California is clear from the legislative history of section 27, which prior to 1931 was section 1275 of the Civil Code. The original section contained the provision "that no corporation can take under a will, unless expressly authorized by statute so to take."

In 1881 the Legislature adopted "An Act to authorize the several counties, cities and counties, cities and towns of this State, . . . to receive prop-

erty by gift, bequest, and devise, . . . (Stats. 1881, p. 2.) In 1905, an amendment carried "counties" and "municipal corporations" into section 1275, and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 27.) Clearly when "counties" and "municipal corporations" were thus added, those words went into section 1275 with the same geographical meaning which the act of 1881 had expressly given them, and which they had worn for 24 years. In 1931, then, when the Legislature added "the state" in connection with "counties" and "municipal corporations" it could not have meant any state other than California.

The case of *United States* v. *Fox*, 94 U. S. 315 [24 L. Ed. 192], is directly in point. The testator, a resident of the state of New York, devised and bequeathed all his property to the govenment of the United States. The statute of New York provided that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question was as to "the validity of a devise to the United States of real estate situated in the State of New York." The Supreme Court held (as the state court had, 52 N. Y. 530 [11 Am. Rep. 751]) that this question had to be determined by the laws of New York. The court, speaking through Mr. Justice Field, said: "The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended . . . A devise to the United States of real property situated in that State is, therefore, void."

True the New York law spoke only of devises of real property while the instant case deals with a bequest of personalty. The reasoning of the Fox case, however, based as it is on the right of a state to say who can, and who cannot, take by the will of one of its residents, applies with equal force to this case. Indeed the Supreme Court as recently as 1942 in the Irving Trust Co. case, *supra*, cited the Fox case as supporting its broad statement, already quoted, that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

The government's contention that if the state law should be construed as invalidating the bequest "serious constitutional questions would arise" is answered by the Irving Trust Co. case. Its claim that, assuming "that the Fox case cannot be distinguished, it must be regarded as overruled," is answered by the court's citation of it as recently as 1942.

It is not necessary to decide whether the words "authorized by statute" found in the last sentence of section 27 mean a statute of this state only, or one of any state, or an act of the Congress, for the government says in its brief that "Various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses" and then frankly concedes that "On the other hand, no Federal statute of general application has purported to authorize the United States to so acquire property."

The government relies chiefly on *Estate of Hendrix*, 77 Cal. App. 2d 647 [176 P. 2d 398] and incorporates into its brief the brief it filed in that case. The bequest there was to the "United States Veterans Administration," an agency of the government. For the reasons appearing in the Hendrix opinion the questions presented in that case and in this are quite dissimilar. [2] This bequest is to the United States of America, without quali-

fication. It is not to any agency of the government, incorporated or unincorporated, or to the government as trustee, or for any particular purpose or use, charitable, benevolent or otherwise. It is in the same general form as was the devise in the Fox case, hence the question presented is simply whether the United States *eo nomine* can take by will under our statute. To answer it otherwise than in the negative would be "to insert what has been omitted" from the statute (Code Civ. Proc., § 1858).

The government relies, also on *Dickson* v. *United States,* 125 Mass. 311 [28 Am. Rep. 230], where the court held valid a devise and bequest to the United States of America. In distinguishing the Fox case the court said that that case "proceeded upon the ground that the law of New York allowed real estate to be devised only to natural persons and to corporations established by the Legislature of that state." The court then said "The statutes of this Commonwealth, where the testator had his domicil, and part of his real estate lay, make no restriction as to who may be devisees or legatees . . ." The California statute, as we have seen, contains definite restrictions.

The order appealed from is reversed.

Nourse, P.J., and Griffin, J. pro tem., concurred.

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